APPENDIX.

The Decision Below.

The following demonstrates beyond doubt the utter inability of the Court below to comprehend the case. The Court said:

> "The only question for our determination is, did the foregoing letter to appellant constitute notice to it of the disallowance of its refund claims." (R. 32.)

There was no such question in the case. If the claims were disallowed by this 1924 letter no notice of disallowance was required. *United States* v. *Michel*, 282 U. S. 656. It was not until 1932 that this decision was repealed by legislation.

The Court below in its opinion also said:

> "The record in the present case and the records in the two former appeals show that on February 2, 1924, the Commissioner by letter notified the appellant that its allowable refunds for 1918 and 1919 were being credited against additional taxes owed by it for the year 1917."

There is no such showing in the record of this case (if there is we quit right here) nor in the other record either. As a matter of fact, on February 22, 1924 the Commissioner didn't even know there would be a credit. See statement in *United States* v. *Swift & Co.*, 282 U. S. at page 472 explaining the procedure in detail. Not only does the Court below import the record of another case but it mistates that record. In another place in its opinion the Court states:

> "On February 2, 1924 the Commissioner of Internal Revenue, by letter, advised appellant that the claim for 1918 was allowed in the sum of $54,841.40" (R. 28).

How could this same letter notify it this claim was disallowed?

The Court below also holds the Statute of Limitations contained in the Revenue Act extinguishes the liability. The *Finn* case, which it cites, is neither an internal revenue suit nor one against a collector. The Court's holding in this respect is contrary to *Retzer* v. *Wood*, 109 U. S. 185 and to *Daube* v. *United States*, 1 F. Supp. 771, 772 (Ct. Cls.); *United States* v. *Krueger*, 121 N. (2d) 842; *United States* v. *Wyoming Central Assn.*, 70 F. (2d) 869, 871 (C. C. A. 10th) and *Helvering* v. *Newport Co.*, 291 U. S. 485, 488 to 491, all of which hold the Statute of Limitations in the Revenue Act does not extinguish the liability.

The Court below in its opinion also states as follows:

> "Section 1103 (b) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. A. Int. Rev. Acts, p. 324, amending Section 3226 of the Revised Statutes as reenacted in Section 1113 (a) of the Revenue Act of 1926, 44 Stat. 116, forbids a suit to be brought for the recovery of taxes more than five years after their payment "Unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit o rproceeding relates."

The 1932 Statute to which the Court refers is quoted at page 6 hereof and a glance at it will disclose that it contains no such provisions as the Court states it contains.

If taxpayer's action is barred it must be because of the provisions of some Statute. Where is that Statute? What is its provision?

The Court below confuses the rules of Civil Procedure. The petition in the District Court was filed before they became effective and they did not apply to it (112 F. (2d) 177, 182) but even if they did rule 8 (c) provides the Statute of Limitations must be affirmatively pleaded. A specific rule always supersedes a general one which would otherwise embrace the subject matter of the specific one.

Consent of the sovereign is not involved here. This action is a common law right as said by Justice Holmes, "The right to sue a Collector for an unjustified Collection was given by the common law." *United States* v. *Emery Co.*, 237 U. S. at p. 31. As said in *Kentucky Improvement Co.* v. *Slack, Collector,* 100 U. S. 648, 654. *Patton* v. *Brady,* 184 U. S. 608, 614, it is the common law action of assumpsit. Such an action proceeds on an equitable basis and the broadest and most liberal rules of pleading apply in construing a plaintiff's complaint. See 291 U. S. 386 at pages 402 and 403.